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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JACK BROWN III,

Defendant and Appellant.

E046970

(Super.Ct.No. RIF126224)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Robert W. Armstrong, Judge. (Retired judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Jack Brown III was charged with seven felonies stemming from two separate incidents of domestic violence, the first occurring on March 18, 2005, and the second on July 28, 2005. A jury found defendant guilty of two of the seven charges, namely, inflicting corporal injury on Trina Brown (Brown) on March 18 in count 6 (Pen. Code, § 273.5, subd. (a)), and assault with a deadly weapon, a box cutter, on Brown's friend or lover, Mike Alvarez (Alvarez), on July 28 in count 2 (Pen. Code, § 245, subd. (a)(1)).¹

The trial court denied defendant's motion to reduce his two felony convictions to misdemeanors (Pen. Code, § 17, subd. (b)), and sentenced defendant to the middle term of three years for the July 28 assault on Alvarez and a concurrent three-year term for the March 18 spousal battery of Brown. The sentences were suspended, however, pending defendant's successful completion of three years' formal probation and 180 days in local custody, to be served through the work release program. The trial court further imposed a \$200 restitution fine and a \$400 suspended probation revocation restitution fine.

¹ A charge of assault with intent to commit rape on Brown on March 18 was dismissed following the close of the prosecution's evidence. (Pen. Code, §§ 220, 1118.1; count 5.) The jury found defendant not guilty of the other charges, including penetrating Brown with a foreign object on March 18 (Pen. Code, § 289, subd. (a)(1); count 4); child endangerment on March 18 (Pen. Code, § 273a, subd. (a); count 7); burglary of the home defendant shared with Brown on July 28 (Pen. Code, § 459; count 3); and spousal battery on Brown on July 28 (Pen. Code, § 273.5, subd (a); count 1). The jury also found defendant not guilty of the lesser included offense of battery to the July 28 spousal battery charge, and found not true an allegation that defendant used a deadly weapon, a box cutter, in committing the July 28 spousal battery.

Defendant appeals, claiming the judgment must be reversed because the trial court erroneously refused to allow the proffered defense testimony of Brown's mother, Kristy Kitchens (Kitchens), which defendant argues would have (1) shown that Brown had a character trait for aggressiveness and was the aggressor in the March 18 incident (Evid. Code, § 1103, subd. (a)(1))² and (2) impeached Brown's testimony that she never once hit defendant during the March 18 incident, and did not say she would see to it that defendant went away and never came back (§ 780).

We affirm. Although Kitchens's proffered testimony was erroneously excluded, it is not reasonably probable that its exclusion affected the jury's guilty verdicts in count 2 or 6. Regarding count 6, the March 18 spousal battery on Brown, defendant testified that Brown was the aggressor, but Brown had many bruises and a cut lip to corroborate her testimony that defendant struck her several times in the head, face, and body. Thus, although Kitchens's testimony may have bolstered defendant's credibility that Brown initiated the March 18 violence and may have undermined Brown's testimony that she did not hit defendant on March 18, the physical evidence that Brown suffered numerous bruises and a cut lip showed that defendant struck her several times on March 18—more than necessary to defend himself against her alleged attack on him.

It is also not reasonably probable that Kitchens's proffered testimony would have affected the guilty verdict in count 2. The July 28 assault on Alvarez, as charged in count

² All further statutory references are to the Evidence Code unless otherwise indicated.

2, was largely shown by the testimony of Alvarez, not Brown. Brown did not witness most of the assault, and Alvarez had bruises and cuts on the back of his head and back that corroborated his testimony that defendant assaulted him with a box cutter.

II. THE EVIDENCE PRESENTED AT TRIAL

A. *Prosecution Evidence*

By early 2005, defendant and Brown had been married seven years and had four children together. By March 2005, defendant and Brown were estranged. Defendant had been seeing another woman and told Brown about the affair. Defendant was living in a recreational vehicle parked outside the home he had previously shared with Brown. He went inside the home only when he was taking care of the children. After defendant told Brown he was having an affair, Brown began dating Alvarez, a man with whom she worked at Walmart. Brown told defendant she was seeing Alvarez. Brown also knew, but did not tell defendant, that Alvarez was cohabitating with another woman.

1. The March 18, 2005, Incident (Counts 4-7)

Alvarez testified that, on the morning of March 18, defendant called him and asked, “what was [he] doing sleeping with [defendant’s] wife.” Alvarez responded that he and Brown were thinking of living together and he was willing to help take care of the children. Defendant and Alvarez were not arguing or yelling at each other. However, during the conversation, Alvarez heard Brown “yelling and shouting” in the background, and also heard defendant shouting at Brown.

Brown testified that she awoke around 8:00 a.m. and heard defendant in the living room talking on the telephone. She approached defendant and asked him, “why are you doing this?” Defendant “jumped up and hit [her] in [her] face,” causing her to fall backwards onto the floor near the hallway. She stayed on the floor and scooted backwards into their son’s room to get away from defendant. Defendant followed and began hitting Brown all over her body. Their two youngest children, who were between the ages of two and four, were crying and tried to come into the room. Defendant tried to shut the door, and Brown yelled at her oldest son to call 911.

Defendant ripped Brown’s pajama pants and underwear and penetrated her with his fingers. He then took Brown into the master bedroom and began removing his pants. He stopped when Brown asked him, “Why are you doing this to us?” Brown then got up, changed her clothes, and took her children outside where she waited for the police.

Brown was outside, on the telephone with her employer, when defendant approached her from behind and either pushed or grabbed her, causing her to fall forward into a toy vehicle. She was carrying her youngest son at the time, and he bumped his head on the toy vehicle. Defendant then pulled Brown, who was no longer holding her son, back into the house by her hair. He sat her down on a “love seat chair” and punched her repeatedly in the head, saying, “This is how it feels to be beaten” or “hit.” The beating ended when defendant abruptly stopped and left the house. Brown suffered bruising to her face and left arm and a cut on her lip.

During the beatings, Brown yelled at defendant to stop and tried to block his blows with her hands. She denied she hit him back, however. Under cross-examination, Brown also denied she tried to grab the telephone away from defendant when she heard him talking to Alvarez, or that she threatened defendant she would “get back at him” or see that he went to jail for cheating on her. Alvarez was still on the telephone when Brown and defendant began arguing, but hung up thereafter.

After defendant left the house, he called 911. Riverside County Deputy Sheriff Sergio Villarreal responded to the call and found defendant waiting for him where defendant said he would be. Defendant told the deputy he had “messed up,” “assaulted” his wife, and “felt real bad” because his children had witnessed it. He appeared remorseful, distraught, and “seemed like he was regretting what he did.” Deputy Villarreal detained defendant, then went to the house and met with Brown, who was crying and upset. Brown told the deputy that she and defendant were arguing about her having an affair, during which defendant pushed her down and hit her. Brown did not mention having her hair pulled or having to scoot backwards into her son’s bedroom.

Defendant moved out of the recreational vehicle and away from the house shortly after March 18. He and Brown continued to speak to each other regarding the children. There were no further incidents of violence until July 28, 2005.

2. The July 28, 2005, Incident (Counts 1-3)

Around 10:30 p.m. on July 28, 2005, Alvarez was visiting Brown in the home she had previously shared with defendant. According to Brown, she and Alvarez were no

longer dating, but were still friends. Brown and Alvarez were talking on the couch in the living room when defendant knocked unexpectedly at the door. Defendant was not supposed to watch the children that night, but Alvarez's car was parked outside the house. According to Brown, she saw defendant through the peephole and warned Alvarez, "Just don't fight or anything." According to Brown and Alvarez, after Brown opened the door defendant walked past her, "rushed" or "charged" toward Alvarez, and "jump[ed] on [him]." Defendant appeared to be angry.

Alvarez stood up and swung at defendant with his right hand in an attempt to protect himself. Defendant grabbed Alvarez, then punched him in the face, and bit him on the head, face, and around the ear. At some point, both men wrestled to the ground. While sitting on Alvarez, defendant hit him in the face with a mason jar and swung some sort of blade toward his neck, saying he had planned to do this for a long time. Alvarez managed to block the blade swings. Defendant finally got up and walked out of the house. Alvarez suffered swelling and bruising to his face, a laceration on his ear, and cuts and scratches on his back and abdomen that appeared to have been inflicted from a blade-type instrument. Although he often used box cutters at work, Alvarez did not have a box cutter or any other type of blade on him that night.

Alvarez testified he had never met defendant before and had not planned to attack or ambush him. Brown also denied there was any plan to ambush defendant that night. Brown and Alvarez "stopped contact" with each other after July 28, 2005. At the time of trial in September 2008, Alvarez was married to another woman.

Brown called 911 from her house while defendant was still attacking Alvarez, but was put on hold. She then ran to a neighbor's house where she stayed until defendant left. While at her neighbor's house, Brown realized her neck was bleeding from a cut. She believed defendant must have cut her neck as he passed her on his way toward Alvarez. She did not hit defendant during the July 28 incident. Under cross-examination, she denied she ever threatened defendant that she was going to make sure he "went away" for cheating on her.

B. Defense Evidence

Defendant testified in his own behalf. In early February, defendant and Brown were estranged, and defendant began living in the recreational vehicle that was parked outside the house he and Brown had been sharing with their four children. Around the same time, defendant told Brown he had been seeing another woman. Brown told him she knew about his affair, but appeared hurt and asked him why he was doing this to her and the children.

Shortly before March 18, defendant asked Brown whether she was seeing Alvarez, and Brown said she was. Defendant then asked Brown whether she loved Alvarez and whether Alvarez loved both her and the children. Brown said she loved Alvarez, and thought he loved her and the children. Defendant then asked Brown why she and the children were not living with Alvarez. Brown said she did not want to live with Alvarez, because she did not want to leave the children. When defendant told her she could take

the children with her, Brown said she did not want to leave the house. Defendant then said, “Well, we’ve got to do something.”

The morning of March 18, Brown came home around 4:00 after working the night shift. Defendant had been sleeping on the couch while the children slept, and heard Brown come home. Defendant got up around 8:00 a.m. and decided to call Alvarez. He called Alvarez because Brown had mentioned that Alvarez had been in a gang. If Alvarez was going to be around his children, he wanted to make sure he was no longer gang-affiliated. He also wanted to know whether Alvarez loved Brown and the children. The conversation was cordial. Alvarez answered “yes” when defendant asked him whether he was “intimate” with Brown, whether he loved Brown, and whether he loved the children.

At some point during his telephone conversation with Alvarez, defendant heard a female voice in the background. At that point, the telephone line abruptly disconnected, and defendant called Alvarez back. Although he did not ask Alvarez about the identity of the other woman, he now suspected that Alvarez was just having sex with Brown. At this point, defendant was in the hallway and Brown was in her bedroom. Defendant said to Brown from the hallway, “oh, no wonder, [Brown], that’s why you can’t go live with him, because he has a girlfriend.” At that point, Brown came out of the bedroom, and defendant continued to taunt her. He said, “That’s the reason why you can’t go live with [Alvarez], because he has a girlfriend. You’re just his outside bitch” or “yard dog.” He also said, “Oh, you’re just getting fucked. He don’t [*sic*] love you.”

Brown began yelling and cursing at defendant. She said, "Why did you call Mike? I didn't call Natalie [defendant's apparent girlfriend] when you told me about her." Brown then began hitting defendant on his back and grabbing for the telephone, and knocked the telephone out of defendant's hand. At that point, defendant elbowed Brown in the face to get her off of him. Although Brown did not fall down, the movement caused her to fall back and hit a wall. Defendant was immediately apologetic and told her he was sorry, but Brown screamed at their son to call 911. Brown was shocked and kept repeating, "You hit me," as she walked backwards into the kids' room.

Defendant followed Brown into the kids' room, grabbed her hand, and continued to apologize. Brown pulled away and kept repeating, "You hit me. You hit me." At some point, the two of them fell over some toys. At that point, defendant saw his daughter coming toward the room. He got up and told Brown, "Here she comes. Get up." Defendant tried to pull Brown up by the back of her pants, but Brown resisted and her pants and underwear tore. Defendant left her on the floor and went outside.

A couple of minutes later, Brown came outside, dressed in different pants, and got on her cell phone. She said to defendant something like, "[Y]ou hit me. You're going to pay for this." She was yelling and very angry. Defendant told her to stop yelling and that he was going to call her mother. Brown stood in front of defendant, blocking his path, and defendant told her to move out of the way. When she did not move, defendant walked around her and went into the house to call Brown's mother. While defendant was

doing that, Brown picked up their youngest son. Defendant did not see that his son hit his head.

Brown followed defendant inside the house, and continued to yell things like, “You’re going to regret ever hitting me. You’re going to go away for a long time. You’re never going to see your kids, and I got you now.” Defendant called Brown’s mother and told her to come and get Brown because Brown was “out of control.” Then he called 911, told them to meet him outside on the street, and left the house. Other than hitting Brown with his elbow while he was on the telephone with Alvarez, defendant denied hitting or punching Brown at any other point, and denied penetrating her with his fingers.

When defendant met with Deputy Villarreal outside the house, he told the deputy, “I hit my wife back. I feel bad.” He did not say he had “assaulted” Brown, but he did say he “lost it” and had never hit her before. Although Brown had often hit defendant, defendant had never hit Brown before March 18. According to defendant, Brown frequently got “loud” and “physical,” and would “get up in [the] face” of anyone who crossed her.

On July 28, defendant was living in an apartment. He would watch the children when he was not working. Around 9:20 that evening, he was called into work and had to be on duty at 11:20 p.m. This meant he was unable to meet Brown to watch the children on the following day as he and Brown had planned. He called Brown multiple times after

9:20 p.m. and left her a message, but she did not call him back, so he decided to stop by the house before beginning his shift at 11:20 p.m.

After leaving Brown another telephone message, defendant left his apartment around 10:30 p.m. and went to the house. Brown opened the door and stepped aside. It was dark outside and dim inside the house. As defendant entered, he saw, out of the corner of his eye, a man get up and come quickly toward him. At first he did not know who the man was, but he saw the man had a box cutter. As the man swung his right hand with the box cutter, defendant caught it. The two men struggled, and defendant “rushed [the man] back to the couch,” while still holding the man’s right hand. During the struggle, defendant realized the man was Alvarez. Sensing he was about to lose his grip on Alvarez’s right hand, defendant bit Alvarez in the head. At that point, Alvarez let go of the box cutter. Seeing the box cutter on the couch, defendant pushed it onto the floor.

While holding Alvarez on the floor, defendant told him, “Man, I didn’t come here for this S-H-I-T. . . . I’ve got to go to work.” Alvarez said, “All right, man. All right,” indicating he was finished fighting, and defendant let him go. Alvarez then “rush[ed defendant] back to the floor.” Thinking Alvarez was going to get the box cutter, defendant grabbed a mason jar from a nearby table and hit Alvarez twice in the face with it. Alvarez relented, this time for good. Defendant left the house and checked into a hotel. He did not report to work because his hand was injured.

Defendant did not have any weapons on him that night. Brown was often in possession of box cutters which she obtained from working at Walmart. Alvarez also had access to box cutters at Walmart.

III. DISCUSSION

A. The Trial Court Erroneously Refused to Admit Defense-proffered Testimony from Brown's Mother; However, the Exclusion of the Mother's Testimony Was Harmless

Defendant claims the trial court prejudicially erred in refusing to allow the defense to call Brown's mother, Kitchens, as a defense witness, (1) to show that Brown had an aggressive character and was the aggressor in the March 18 altercation with defendant (§ 1103, subd. (a)(1)), and (2) to impeach Brown's testimony that she did not hit defendant during the March 18 incident and had not threatened defendant that she would see he went to jail for cheating on her (§ 780).

We conclude that, although Kitchens's testimony was erroneously excluded, both as evidence of Brown's character and for purposes of impeaching Brown's trial testimony, the exclusion of Kitchens's testimony was not prejudicial. Defendant was convicted in count 6 of committing spousal battery on Brown on March 18, and in count 2 of assaulting Alvarez with a box cutter on July 28. For the reasons we explain, there is no reasonable probability that, had Kitchens's testimony been admitted, defendant would have realized a more favorable result in count 2 or 6.

1. Relevant Background

Before the close of the prosecution's case-in-chief, defense counsel proposed to call Brown's mother, Kitchens, as a defense witness to testify that Brown had a reputation for violence and dishonesty, and also to impeach Brown's denial that she (1) hit defendant on March 18 and (2) said she wanted to hurt defendant as badly as he had hurt her. Defense counsel told the court that the defense would be raising a claim of self-defense or mutual combat, and Kitchens would testify that, while listening to a voice mail message defendant left on her answering machine on March 18, she could hear Brown in the background yelling at defendant to give her the telephone and sounding as if she was hitting defendant while he was leaving the message. Kitchens would have further testified that, shortly after the July 28 incident, Brown told her she wanted to "hurt" defendant as badly as he had hurt her and "wanted him to go away and not come back."

The trial court refused to allow Kitchens to testify on the ground she was not a witness to the March 18 incident and therefore could not impeach Brown's denial that she was an aggressive person. The court said: "I'm sorry, Counsel, but it doesn't directly impeach that. If someone was to come in and talk about someone being a bad person, that strictly is the opinion of that person, and unless it's substantiated by direct observations of the conduct that's in question here, which were the assaults that were alleged by the defendant of which he [*sic*] was not a percipient witness, then it's immaterial to the issues in this case."

After defense counsel argued that “the defense has the right to put forward evidence that the other person was the aggressor,” the court said: “Mike Alvarez is a percipient witness, and he can testify, but a nonpercipient witness cannot testify to the offenses that were committed here. And to simply try to put in evidence of bad character to combat what happened, if it were self-defense, then it has to be somebody who was there to say it was self-defense and not someone who says, oh, well, she’s always starting things. Therefore, she must have started things here. That won’t fly.”

2. Analysis/Kitchens’s Proffered Testimony Was Admissible

Evidence of a person’s character is generally inadmissible to prove that the person acted in conformity with his or her character or trait of character on a given occasion. (§ 1101, subd. (a).) Section 1103, subdivision (a)(1)³ sets forth an exception to this general rule. It allows a criminal defendant to present evidence of the victim’s character to show that the victim acted in conformity with his or her character or trait of character at the time of the alleged crime. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446.) Thus, “in a prosecution for . . . an assaultive crime where self-defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor. [Citations.]” (*Id.* at pp. 446-447, fn. omitted.)

³ Section 1103, subdivision (a)(1) states, in pertinent part: “(a) In a criminal action, evidence of the character or trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.”

“[The victim’s] character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.]” (*People v. Wright* (1985) 39 Cal.3d 576, 587.) By definition, evidence of the victim’s reputation for violence or aggressiveness is not limited to specific acts of the victim *at the time of the alleged crime*. (*People v. Rowland* (1968) 262 Cal.App.2d 790, 797.) Instead, evidence that the victim had a reputation for violence or aggressiveness, and acted in conformity with that reputation at the time of the alleged crime, may be shown by acts of violence or aggression on the part of the victim *before or after* the time of the alleged crime. (*Ibid.*; *People v. Shoemaker, supra*, 135 Cal.App.3d at p. 447.)

Kitchens would have testified that (1) Brown liked confrontations with people, including shoplifters at Walmart, (2) was often involved in school fights while growing up, and (3) was known to tell lies and greatly exaggerate claims for her own benefit. Kitchens would have further testified that Brown told Kitchens that she, Brown, “wanted to hurt [defendant] just as bad as he hurt [her] and wanted him to go away and not come back.” Lastly, Kitchens would have testified that, while listening to the message defendant left on her answering machine on March 18, she heard Brown in the background yelling at defendant to give her the telephone, and it sounded as though Brown was hitting defendant.

Kitchens’s reputation testimony was admissible to show that Brown had a general reputation for aggressiveness or violence, for telling lies, and for exaggerating claims for her own benefit. Specifically, the testimony was admissible to show that Brown acted in

conformity with her reputation for aggressiveness and dishonesty by (1) being the aggressor in the March 18 incident, (2) lying when she denied hitting defendant on March 18, and (3) lying when she denied she said she wanted to hurt defendant or see that he went away and did not come back. (§ 1103, subd. (a)(1).)

Kitchens's testimony was also admissible to impeach Brown's testimony that she did not hit defendant on March 18, and she did not say she wanted to hurt defendant and see that he went away and did not come back. Subject to exceptions not applicable here, section 780 allows a party to present evidence of "*any matter* that has any tendency in reason to prove or disprove the truthfulness" of the testimony of a witness. These matters include statements by the witness that are inconsistent with any part of his testimony (§ 780, subd. (h)) and the "existence or nonexistence of any fact testified to" by the witness (*id.*, subd. (i)).

The People argue the trial court ruled that Kitchens's testimony was "immaterial" under section 352, and did not abuse its discretion in so ruling. We disagree. Section 352 affords a trial court broad discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) As with other evidence, the admissibility of character and impeachment evidence is subject to the limitations described in section 352. (*People v. Wright, supra*, 39 Cal.3d at p. 587 [character evidence subject to section

352]; *People v. Williams* (2008) 43 Cal.4th 584, 634-635 [impeachment evidence subject to section 352].)

It will not be presumed, however, that a trial court excluded evidence under section 352. ““If a proper objection under section 352 is raised, the record must affirmatively demonstrate that the trial court did in fact weigh prejudice against probative value. The trial court need not make findings or expressly recite its weighing process, or even expressly recite that it has weighed the factors, so long as the record as a whole shows the court understood and undertook its obligation to perform the weighing function. [Citations.]’ [Citation.]” (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1685.) Here, the prosecution did not object to the admission of Kitchens’s testimony under section 352, and the trial court did not exclude the testimony for any purpose related to section 352. Instead, the court ruled that Kitchens’s testimony was inadmissible as character evidence because she was not a percipient witness to the March 18 incident. For the reasons discussed, this was error.

3. Analysis/The Exclusion of Kitchens’s Testimony Was Not Prejudicial

Defendant claims the exclusion of Kitchens’s testimony deprived him of his constitutional right to present a defense and “fall[s] within the *Chapman*^[4] standard of review” of harmless beyond a reasonable doubt. We disagree.

A defendant has a due process right to “present all relevant evidence of *significant* probative value to his or her defense.” (*People v. Cunningham* (2001) 25 Cal.4th 926,

⁴ *Chapman v. California* (1967) 386 U.S. 18, 24.

998-999.) And, “[a]lthough the complete exclusion of evidence intended to establish an accused’s defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.] Accordingly such a ruling, if erroneous, is ‘an error of law merely,’ which is governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 [Citation.]” (*Id.* at p. 999.)

The erroneous exclusion of Kitchens’s testimony did not deprive defendant of his constitutional due process right to present a defense. Defendant himself testified that Brown initiated the March 18 incident by trying to grab the telephone away from him. He also testified that Brown frequently got “loud” and “physical,” and would “get up in [the] face” of anyone who crossed her. Thus, evidence that Brown had a reputation or character trait for aggressiveness and violence was presented to the jury, through defendant. Defendant also challenged Brown’s credibility with his own testimony. Defendant’s testimony was thus largely duplicative of Kitchens’s proffered testimony concerning Brown’s reputation for aggressiveness and dishonesty, and Brown’s untruthfulness or bias against defendant.

Further, it is not reasonably probable that the exclusion of Kitchens’s testimony affected the jury’s guilty verdicts in count 2 or 6. (*People v. Watson, supra*, 46 Cal.2d at p. 836 [state law error harmless unless there is a reasonable probability that, but for the error, the defendant would have realized a more favorable result].) Regarding the March 18 spousal battery on Brown as charged in count 6, defendant testified that Brown was

the aggressor, but Brown had many bruises on her face, head, and body, and a cut lip. This physical evidence corroborated her testimony that defendant struck her several times in the head, face, and body, and did not merely “elbow” her to get her off of him. Thus, although Kitchens’s testimony may have bolstered defendant’s credibility that Brown initiated the March 18 violence and may have also undermined Brown’s testimony that she did not strike defendant on March 18, the physical evidence that Brown suffered numerous bruises and a cut lip clearly showed that defendant struck her several times—more than necessary to defend himself against her alleged attack on him. The physical evidence also directly undermined defendant’s testimony that he merely “elbowed” Brown to get her off of him. Further, Deputy Villarreal testified that, when he met with defendant shortly after the March 18 incident, defendant said he had “messed up,” “assaulted” his wife, and appeared remorseful and distraught. This testimony further undermined defendant’s testimony that he merely “elbowed” Brown.

It is also not reasonably probable that Kitchens’s proffered testimony would have caused defendant to realize a more favorable result in count 2. The July 28 assault on Alvarez, as charged in count 2, was largely shown by the testimony of Alvarez, not Brown. Brown did not witness most of that assault, because she ran to a neighbor’s house shortly after defendant came into the house and allegedly attacked Alvarez. Thus, the evidence concerning the July 28 assault on Alvarez was largely a credibility issue between defendant and Alvarez, as to which of the two men attacked the other, and did not involve Brown’s reputation for aggressiveness, dishonesty, or her bias against

defendant. Moreover, Alvarez had bruises on his face and cuts on the back of his head and his back. This physical evidence corroborated Alvarez's testimony that defendant assaulted him with a box cutter.

B. The \$400 Parole Revocation Fine Must Be Reduced to \$200

Defendant claims the trial court erroneously imposed a \$400 stayed probation revocation restitution fine (Pen. Code, § 1202.44), in light of its imposition of a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), and the \$400 stayed probation revocation restitution fine must be reduced to \$200, the same amount as the restitution fine. The People agree. So do we.

A fine imposed pursuant to Penal Code section 1202.4, subdivision (b)⁵ is a “garden-variety restitution fine, payable to the state.” (*People v. Guiffre* (2008) 167 Cal.App.4th 430, 433, fn. omitted.) “‘Restitution fines are required in all cases in which a conviction is obtained.’ [Citation.]” (*Id.* at pp. 433-434.)

“The fine imposed under [Penal Code] section 1202.44, however, is a *probation revocation* restitution fine, which was intended to mirror the parole revocation restitution fine currently provided for in [Penal Code] section 1202.45. [Citation.]” (*People v.*

⁵ As pertinent, Penal Code section 1202.4, subdivision (b)(1) provides: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars (\$100), and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor.”

Guiffre, supra, 167 Cal.App.4th at p. 434.) Penal Code section 1202.44 calls for the court to impose a probation revocation restitution fine *at the same time* it imposes a Penal Code section 1202.4, subdivision (b) restitution fine, and *requires* that the probation revocation restitution fine be in the *same amount* as the Penal Code section 1202.4, subdivision (b) fine.⁶ (*People v. Guiffre, supra*, at p. 434.)

The trial court's oral pronouncement of sentence reflects that it imposed a \$200 restitution fine and a \$400 probation revocation restitution fine, although its minute order reflects that it imposed only a \$200 probation revocation restitution fine in accordance with Penal Code section 1202.44. Still, this was error. The matter must be remanded to the trial court with directions to reduce defendant's probation revocation restitution fine from \$400 to \$200.

IV. DISPOSITION

The matter is remanded to the trial court with directions to amend defendant's sentence to reduce his probation revocation restitution fine from \$400 to \$200. In all other respects, the judgment is affirmed.

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⁶ Penal Code section 1202.44 provides, in pertinent part: "In every case in which a person is convicted of a crime and a conditional sentence or a sentence that includes a period of probation is imposed, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of [Penal Code] Section 1202.4, assess an additional probation revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of [Penal Code] Section 1202.4. This additional probation revocation restitution fine shall become effective upon the revocation of probation or of a conditional sentence, and shall not be waived or reduced by the court, absent compelling and extraordinary reasons stated on [the] record."

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Gaut
J.